FOO CHING

v.

JOAN CECILIA SURIN

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL SUIT NO. F 55 OF 1981]
31 DECEMBER 1984

LAND LAW: *Sale and purchase agreement - Whether disguise to cloak a money lending transaction - Whether sale and purchase agreement should be set aside.*

The plaintiff and the defendant executed a sale and purchase agreement for the sale of the defendant's double-storey terrace house to the plaintiff for RM90,000 under the terms of the agreement. The defendant also executed a memorandum of transfer of the property in favour of the plaintiff. The title deed to the property was also given to the plaintiff who lodged a caveat in the Land Office against the property. The defendant then refused to deliver up vacant possession of the property. The plaintiff brought this action for vacant possession, damages and loss of rentals. The defendant alleged that she did not agree to sell the house and that the transaction was one of money lending whereby the plaintiff lent money to one Alocius a/1 Fernandez Silvary on the security of her house which she agreed to provide. She further alleged that the plaintiff was not a licensed money lender and the sale and purchase agreement was a cloak to disguise the money lending transaction. The defendant sought a declaration that the sale and purchase agreement was null and void and unenforceable and for delivery of the memorandum of transfer and the document of title and for the withdrawal of the caveat.

Held:

[1] There was no evidence that the plaintiff was a money lender.

[2] On the facts of the instant case there was no need for disguise.

[3] The defence and counterclaim to be struck out and the defendant to deliver vacant possession of the property to the plaintiff within two months.

[Judgment for plaintiff. Damages to be assessed for breach of contract. Costs to plaintiff.]

Cases referred to:

A. Kanapathi Pillay v. Joseph Chong [1981] 2 MLJ 117
Ngui Mui Khin and Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9

Legislation referred to:

Money Lenders Ordinance 1951
Rules of High Court 1980, O. 18 r. 19(1)

For the plaintiff - G. Krishnan; M/s. Krishnan & Co.
For the defendant - S.K. Aiyer; M/s. Krishna, Menon & Partners

JUDGMENT

Wan Hamzah J:

On 7 October 1980 the plaintiff and the defendant executed a sale and purchase agreement (Exhibit TCC1) in which they purportedly agreed that the defendant should sell her double-storey terrace house on land lot No. 16345/338, Mukim of Kuala Lumpur, to the

plaintiff at the price of RM90,000 under the terms stated therein. The defendant also executed a memorandum of transfer of the property in favour of the plaintiff, and it appears that the document of title of the property was given to the plaintiff and the plaintiff lodged a caveat in the Land Office against the property. The plaintiff alleges that he had on his part carried out the terms of the agreement but the defendant has refused to deliver possession of the property to him despite the fact that his solicitors had by letter asked the defendant to do so. In this suit the plaintiff asks for an order that the defendant should vacate the house and deliver possession of the property to him and he also claims damages for the breach of the agreement, in respect of loss of rentals calculated at RM400 per month from 5 January 1981 until vacant possession is delivered. The defendant contests the claim and denies that she had agreed to sell her house, but alleges that the transaction was one of money lending, whereby the plaintiff lent money to one Alocius a/1 Fernandez Silvary (to whom I shall refer as Alocius) on the security of her house, which she had agreed to provide. She alleges that the plaintiff was not a licensed money lender and the sale and purchase agreement was a cloak to disguise the money lending transaction. Therefore in her counterclaim she asks for a declaration that the sale and purchase agreement is null and void and unenforceable, and for an order that the plaintiff should deliver up to her the memorandum of transfer and the document of title and withdraw the caveat. She also asks for damages but she does not state for what loss she claims damages.

The plaintiff filed a summons asking for an order that the defence and counterclaim be struck out under O. 18 r. 19(1) of the Rules of the High Court, and that he be at liberty to enter judgment. The Senior Assistant Registrar dismissed the summons, and this appeal is brought against the decision of the Senior Assistant Registrar. In her affidavit in opposition to the plaintiff's application the defendant alleged that Alocius wanted to take a loan of RM90,000 from the plaintiff and he (Alocius) asked her to help him to provide security for the loan, which the plaintiff required, and she agreed and gave the document of title of the property as security for the loan. She denies that she received any payment of money from the plaintiff.

I have already mentioned about the defendant's allegation that the sale and purchase documents were made as a disguise for money lending transaction in order to avoid the provisions of the Moneylenders Ordinance 1951 because the plaintiff was not a licensed money lender. But there is not an iota of evidence that the plaintiff was a moneylender, and the defendant made no attempt to show that he was one. Therefore the provisions of the Ordinance do not apply to him and there was no reason why the transaction, if it was a money lending transaction, should be disguised as something else. In the case of *A. Kanapathi Pillay v. Joseph Chong* [1981] 2 MLJ 117, an allegation and contention similar to the allegation and contention in this case, were made by the appellant. The Federal Court dismissed the appeal, and the following is an extract from the judgment from the judgment of the Federal Court:

> ... we find that there is not an iota of evidence to show that respondent was a money-lender. He was and still is a public accountant practising under a firm name of Joseph K.L. Chong & Company. There is no evidence to show that he was carrying on a business of lending money nor is there any evidence to show that he had lent money to other people. The allegation that he was a money-lender is simply confined to the transactions between him and the appellant, which he maintained but was denied by the respondent to be a loan. ... we wish to say that even if the transactions between them were held to

be a loan, they are not to be struck down under the Moneylenders Act because the respondent was not a money-lender within the meaning of the Act for the reasons stated above. There is simply no evidence to prove this.

In the case of *Ngui Mui Khin and Another v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9 the Federal Court held that the transactions entered into by confirming houses with the parties in the export trade could not be money lending transactions, and the following is a passage in the judgment of the Federal Court:

> At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to money lending but only to moneylenders. It does not make every money lending transaction illegal and unenforceable. It is only a money-lending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the Court. We make this simple and obvious observation because it was canvassed very strongly before us by Counsel for the appellants that since the transactions between the respondents and the client are money lending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. He is a moneylender if within the meaning of s. 2 or the Ordinance he can be said to be a person "whose business is that of money lending". To prove business requires some sort of continuity or system or repetition of similar transactions.

In the present case, since there was no necessity for disguise, the defendant's allegation that the sale and purchase documents were not genuine but a disguise cannot be true.

There are other reasons why the defendant's version cannot be accepted. In his affidavit dated 17 July 1981 Alocius stated to the effect that he needed money to help his company Urban Properties Sdn. Bhd. to purchase all the shares in another company, and he also stated that he informed the defendant that he needed RM90,000 and wanted to raise that much. In her affidavit dated 17 July 1981 the defendant stated that out of the alleged loan of RM90,000 certain amounts were retained by or on behalf of the plaintiff for interest on the loan, discharge of the property and legal fees, leaving a balance of RM62,000 which was received by Alocius in three installments, and Alocius confirmed these allegations in his affidavit of the same date. If Alocius needed RM90,000 and the defendant agreed to help him to raise the money by providing the security, one wonders why they should enter into a loan transaction whereby Alocius can utilise a sum of RM62,000 only for his company. Thirteen documents were produced to the Court as exhibits attached to the various affidavits, and the defendant's version is inconsistent with all of these documents.

In his affidavit dated 9 September 1981 Mr. Chen Chin Min stated that he was the solicitor acting for both the plaintiff and the defendant in the transaction. In his affidavit dated 3 November 1981 Mr. Chen stated "documentation was done as per instructions given for the sale and purchase of the property in question". By another affidavit of the same date Mr. Chen produced a pay-in-slip (Exhibit CCM9) showing that a sum of RM80,000 was paid by the plaintiff into his firm's account on 8 October 1980 in connection with the transaction. If the alleged loan of RM90,000 with interest of RM18,000 was true, it would not be necessary for the plaintiff to release to the solicitor as much as RM80,000 in connection with the transaction because the plaintiff would have retained RM18,000 in respect of the interest.

I find that the statement of defence and counterclaim is an abuse of the process of the Court. The appeal is allowed and the Senior Assistant Registrar's decision to dismiss the plaintiff's summons is set aside. I order that the defendant's statement of defence and counterclaim be struck out, and that the defendant should deliver vacant possession of the property to the plaintiff within two months. I also order that damages be assessed for breach of the contract. Costs to the plaintiff on the plaintiff 's claim and summons and in this appeal.

Also found at [1985] 2 CLJ 47